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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1904

No. 135.

GEORGE S. WHITAKER AND MARY I. WHITAKER,
Plaintiff in Error,

VS.

THOMAS M'BRIDE AND WILLIAM H. KILLGORE,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR

E. C. CALKINS AND
H. M. SINCLAIR,
Attorneys for Defendants in Error.

THE KEARNEY DEMOCRAT PRINTER.

M. P. KINKAID,
of Counsel.

IN THE

SUPREME COURT

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No. 135.

May it please the Court:

As the interests of each of the defendants in error in this controversy now seem to be mutual, we present a common brief in their behalf. We do this believing that what may be urged on behalf of both will be equally applicable on behalf of either.

We are advised that this case will soon be reached upon the calendar of this court. The plaintiffs in error have not furnished us with a copy of their brief, nor are we advised that they have yet prepared one. To avoid the possibility of not having time after the filing of their brief to prepare and print one on our behalf,

we have concluded to do so now, so that Your Honors may have from us a short statement of the facts with the citation of a few authorities which seem to us to solve the legal questions involved.

Statement.

The Fort Kearney military reservation was surveyed and opened for settlement in 1877, under an Act of Congress approved July 21st, 1876. Chap. 220, Vol. 19, U. S. Stat. at Large. In this survey the south-east quarter of Section 12 in Township 8 is intersected by a channel of the Platte River, known as Mosquito Channel. This channel was meandered in the survey. That part of the quarter section lying north of this channel was surveyed into one full forty acre tract and two fractional lots numbered on the Government plat as Lots 6 and 7, which are now owned by the defendant Killgore. The part lying south of this channel consists of a fractional lot and is marked Lot 8, and was a part of the homestead entry of the defendant McBride. (See Ex. A, page 75.) About midway between these lots, in or near the center of the channel, is an island of about 18 acres in extent. This island has never been surveyed. The defendants in error claim that their respective grants of the said fractional lots gave them title under the laws of the State of Nebraska to the thread of the meandered stream. This in-

cludes the island in controversy. They had been in possession of this island for many years and were in actual and peaceable possession thereof in April, 1897, when the plaintiff in error moved a house thereon, brought his family and "squatted" on the island, claiming it was Government Land, and he had a right for this reason to take possession of it and reside thereon.

He made no entry of this land at the Land Office, procured no filing thereon, neither did he obtain recognition of his claim from any source.

On June 27th, 1898, the defendant in error McBride commenced this action in the District Court of Buffalo County, Nebraska. His amended petition, on which the case was tried, is found on pages 12-14 of the printed record and is as follows:

Amended Petition.

The plaintiff complains of the defendants and for cause of action against them alleges:

First.

That plaintiff is the owner in fee simple of the following described lands situated in Buffalo county, Nebraska, to wit: Lots eight (8) in section twelve (12) township eight (8) range fifteen (15) and lot five (5) in section thirteen (13) township eight (8) range fifteen

(15) according to the survey thereof made under the orders of the surveyor general of the United States under authority of the various acts of Congress relating to the survey of public lands of the United States, and particularly under the act of Congress relative to the survey and entry of the Fort Kearney military reservation of which said lands are a part, and according to the official map of said survey duly made and filed in the office of the surveyor general.

Second.

That according to said survey said lots were bounded on the north by a certain channel or branch of the Platte river known and designated on said map and survey as Mosquito channel.

Third.

That the land in said section twelve (12) lying north of said Mosquito channel was surveyed into lots numbered six (6) and seven (7) and the northwest quarter of section twelve (12) and lot two (2) of section thirteen (13) which lots are now owned by said defendants Kilgore and that said lots are bounded on the south according to said map or survey by the north bank of said Mosquito channel.

Fourth.

That where said Mosquito channel passes through

between the plaintiff's said land and the lots so as aforesaid owned by the defendant Kilgore there was formed in said Mosquito channel a low, wet island or middle ground which in dry time and low stage of water in the Platte river separate the said Mosquito channel into two streams or channels which unite both above and below the said island or middle ground.

Fifth.

That said island or middle ground was never surveyed and that the Government of the United States who owned and surveyed said land afterwards and on or about the 28th day of March, 1885, granted the said lot eight (8) in section twelve (12) and lot five (5) in section thirteen (13) to this plaintiff without any reservation, and the plaintiff alleges that by virtue of said grant he took to the center of the thread of the stream of said Mosquito channel. That said lots six and seven in section twelve (12) and lot two in section thirteen (13) were afterwards granted by the United States to the said Kilgore without any reservation of said island or middle ground, so that the bed of said Mosquito channel and the island therein and middle ground thereof are owned by the plaintiff and defendant Kilgore, but that the boundary line between them has never been marked or ascertained. That the meander line as shown by the field notes and map of said Gov-

ernment survey do not coincide with the banks of said Mosquito channel as they now exist, and that there exists a controversy between the plaintiff and defendant Kilgore as to where said boundary line should be located.

Sixth.

That owing to the daming of the channels further up the stream and the general subsidence and recession of the waters of the Platte river said island and middle ground which was at the time of said survey covered with water at high stages has become much dryer and more valuable for pasture and susceptible for use for agricultural purposes and that on or about the first day of April, 1897, the defendants Whitaker moved upon said island or middle ground and have erected a house thereon and claim the same as their own, but that in truth and in fact the said Whitakers have no right, title or claim of any kind to said land and are mere trespassers, but whether they are upon this plaintiff's land or the land of the Kilgore or both this plaintiff is, on account of the uncertainty of the location of said boundary line, unable to say, but that said island or middle ground is owned by this plaintiff or said Kilgore and has been in the possession of this plaintiff and said Kilgore for more than ten years before the said entry of the said Whitakers.

Wherefore plaintiff prays that the title to the lands herein described be forever quieted; that the boundary line between the plaintiff and said defendant Kilgore be ascertained and declared and that a writ of ouster be granted plaintiff for the possession of said premises.

W. D. OLDHAM,
Attorney for Plaintiff.

The amended answer and cross petition of the defendant in error Kilgore is found on pages 14–15 of printed record and is as follows:

In the District Court of Buffalo County, Nebraska.

THOMAS McBRIDE, Plaintiff,

vs.

GEORGE S. WHITAKER, MARY I. WHITAKER, WILLIAM H. Kilgore, and Sophia Kilgore, Defendants.

Amended Answer.

And now comes the above named defendants, William H. Kilgore and Sophia A. Kilgore his wife, and for answer to the plaintiff's amended petition allege:

First.

That at all the time mentioned the defendant William H. Kilgore was the owner in fee simple and in the possession of the following described lands: the tenements situate in the county of Buffalo and State of

Nebraska, described as follows: Lots six and seven in section twelve (12) and lot two in section thirteen (13) township eight (8) north of range fifteen (15) west according to the Government survey.

Second.

That said lots lie on the north bank of Mosquito channel, one of the channels of the Platte river, and south of said lots and channel of the Platte river there is situated certain middle grounds or island which was left unsurveyed at the time of the Government survey of the adjacent lands.

Third.

That while said island or middle grounds remained unsurveyed the United States granted to Abraham Rayburn said lots numbered six (6) and in the same manner and while same — said land was unsurveyed the United States granted unto William Walker the said lot numbered seven (7) in section twelve (12) lot numbered two (2) in section thirteen (13).

Fourth.

That the grants so as aforesaid made to said Rayburn and said Walker were made with reference to said Government survey which bounded said lots from the north bank of said Mosquito channel. That the meander line of said survey along the north bank is as

indicated by the field notes and map thereof do not coincide with the actual lines of said north bank as it now exists, but cross said bank and include in the boundaries of said lot a large part of said island or middle ground and that the said grantee took by virtue thereof to the centre of said Mosquito channel, but that on account of discrepancy of said original survey the said line remains doubtful and uncertain.

That the lots so conveyed to the said Rayburn was by him conveyed to the defendant William H. Kilgore by deed dated on the 14th day of September, 1889, and that the lots so as aforesaid granted to the said William Walker conveyed to the defendant William H. Kilgore by deed duly executed and dated the 26th day of October, 1889.

Sixth.

That the defendant William H. Kilgore by himself and his said grantors has been in possession of said lots including island or middle ground to the centre of said Mosquito channel ever since the entry of said lots by said Rayburn and Walker.

Wherefore these defendants pray that the said defendant William H. Kilgore may be adjudged to be the owner of said island or middle ground to the centre or thread of said Mosquito channel and that the same may

be the judgment of this court be determined and fixed, and that these defendants may have such other and further relief as they may be entitled to.

E. C. & H. V. CALKINS,

Attorneys for Defendants Kilgore.

The answer of the plaintiff in error is found on pages 9-10 of the printed record and is as follows:

"In the District Court of Buffalo County, Nebraska.

THOMAS McBRIDE, Plaintiff,

vs.

GEORGE WHITAKER, His Wife, ET AL., Defendants.

Answer of Defendants, George and Mary I. Whitaker.

Comes now the defendants George and Mary I. Whitaker his wife and for their answer herein alleges as follows, to wit:

First.

That the court has no jurisdiction of the subject matter involved in this case.

Second.

That the allegations of plaintiff's petition does not state facts sufficient to constitute a case in equity.

Third.

The plaintiff has an adequate remedy at law.

Fourth.

That said George Whitaker is a citizen of the United States and of the State of Nebraska That he has never used his homestead rights under the homestead laws of the United States. That he is of lawful age, a head of a family.

Fifth.

That this defendant for the purpose of entering upon lands under the homestead laws of the United States, has entered upon and settled upon a tract of land unsurveyed and unoccupied located in section 12 (12) town eight (8) range fifteen (15), Buffalo county, Nebraska. That said tract has never been entered upon or settled upon or proved upon by any one, and contains twenty-seven and one half acres in said section twelve (12).

Sixth.

That said tract of unsurveyed land is not within the meander line on the north side of said lot eight (8) in section twelve (12) and not within the meander line on the north side of said lot five (5) in section thirteen (13) but lies north of said meander line.

Seventh.

That plaintiff has no title, right or interest in tract of land.

Eighth.

That plaintiff never entered or proved upon *on* said said tract, nor has has he any title, right or interest by, under or through any one to said tract.

Ninth.

That the said tract of land is owned by the United States Government, is subject to entry, and this defendant now lives on said tract under his right as a citizen under the homestead laws of the United States.

Tenth.

That these defendants deny each and every allegation contained in plaintiff's petition, not herein specifically admitted.

Wherefore these defendants pray that they may go hence without day and recover their costs and that the court decree said lands to be Government lands subject to entry and that the plaintiff be decreed to have no right, title or interest in said lands, and that defendant, George Whitaker, be in lawful possession thereof.

GEORGE AND MARY I. WHITAKER,
By FRED A. NYE, *Their Attorney.*

The findings and decree of the trial court is found on pages 16-18 of the printed record and is as follows:

THOMAS MCBRIDE, Plaintiff,

vs.

GEO. S. WHITAKER, —— WHITAKER, His Wife; WILLIAM H. Kilgore and —— Kilgore, His Wife, Defendants.

Judgment.

Now on this 13th day of June, 1899, this cause came on for hearing and trial before the court the parties hereto appearing by their respective attorneys, this cause is submitted to the court upon the pleadings, the evidence offered and introduced therewith, and the argument of counsel, and the court having considered the same being advised in the premises, finds:

That the plaintiff McBride at the time of the bringing of this suit was the owner of lot eight (8) in section twelve (12) township eight (8) range fifteen (15) in Buffalo county, Nebraska. That he made the original entry therefor and obtained title to the same by the United States patent, and has been in the open and notorious possession of the same for fifteen or twenty years.

The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots 6 and 7 in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said

tract, and that he has been in possession of the same for more than ten years prior to the bringing of this suit.

That said tract of land, with other land, was within the extreme channels of the Platte river; and that lying between lots six and seven on the north and lot 8 on the south, was a tract of land in said section 12, of about 22 acres entirely surrounded by certain channels of the Platte river, and which is the tract of land in dispute herein.

That the Government surveyor when originally surveying said lots 6 and 7 did not actually survey the meander line forming the south line of lots six and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots 6 and 7, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots 6 and 7. That they never made an actual survey of the north meander line of said lot 8 but indicated upon the plat made by them what they supposed to be the meander line of said lot 8. That they never actually surveyed the meander lines of said tract of land lying between lots 6 and 7 on the one side and lot 8 on the other and which tract is spoken of in the evidence as an island but that

they indicated upon the plat the general outlines of said island as they understood it to be.

The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7, and the other on the north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked Plaintiff's Exhibit "A" offered in evidence.

The court further finds that the defendant Kilgore at all times since he became the owner of said lots 6 and 7 claimed to be the owner of the tract in dispute as part of his lots 6 and 7: that such claim had not extended over the period of ten years at the bringing of this suit; that he had possession during a part of the time of all said tract and all the time a part of said tract.

That McBride ever since he obtained his final receipt to lot 8 has claimed to be the owner of a part of said island: that they together have had the title to lot 6 and 7 on the one side and lot 8 on the other and have had possession of the island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of said island each should have and did not agree.

The court further finds that the south line of said lots 6 and 7 is the channel line as shown in Exhibit "A," and that the north line of said lot 8 is the channel bounding it on the north, as shown in Exhibit "A."

As a matter of law the court concludes that said island should have been surveyed by the Government surveyor; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the Government at the time it gave its patents to said lots 6 and 7 to convey any part of the island, nor was it the intention of the Government to convey it to the patentee of lot 8; that the only interest the defendant Whitaker has in the said land is that he claims the right to enter the same as a homestead and that his right is only what possession would give him, and that he has no title thereto.

The court further concludes as a matter of law that the Government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the Government granted the land on either side thereof any right to it. To which findings the plaintiff and defendant Kilgore each except.

It is therefore considered adjudged and decreed by the court that as to the plaintiff herein and defendant W. H. Kilgore the above entitled action be and the same is hereby dismissed, and that the costs of this action to wit: $79.95 be taxed equally to said plaintiff and defendant W. H. Kilgore. To which the plaintiff and defendant Kilgore each duly except and are allowed forty days from the rising of the court in which to prepare and present to opposing counsel their bill of exceptions.

Both McBride and Killgore appealed from this decree to the Supreme Court of the state of Nebraska. Upon consideration of the appeal the Supreme Court of the state of Nebraska reversed the decree of the district court and directed it to enter a decree quieting the title to the north half of the island in Kilgore and the south half thereof in McBride. The opinion of the Supreme Court of the state of Nebraska in the matter is found on pages 82–94 of the printed record in this case.

Thereafter on June 22nd, 1903, the district court entered the decree as directed. This decree is found on pages 113–114 of the printed record. Upon this decree the Whitakers prosecute error to this court.

Argument.

The two propositions that we respectfully submit

to Your Honors are:

1. This court has no jurisdiction of this case for the reason that no Federal question is involved therein.

2. The decision of the Supreme Court of the state of Nebraska is in accordance with the laws of the United States upon the questions involved.

We will briefly discuss each in the order formulated.

I.

As to the first proposition.

In Sevier vs Haskell, 81 U. S. 12, (14 Wall) the court said: "Where the judgment of a state court is brought into this court for review, to warrant the exercise of the jurisdiction invoked, the case must fall within one of the three categories:

1. There must have been drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision of the state court must have been against the validity of the claim which either is relied upon to maintain.

2. Or there must have been drawn in question a statute of, or an authority exercised under, a state, on the ground of their being repugnant to the Constitution, a law or treaty of the United States and the de-

cision must have been in favor of the validity of the state law or authority in question.

3. Or a right must have been claimed under the Constitution or a treaty or a law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed."

It is clear that the provisions of the two last cannot be invoked as a basis of jurisdiction because no question within their purview is presented.

We then turn to the first. This includes but three causes: 1, a treaty, 2, a law, and 3, an authority exercised under the United States. There is no question arising out of a treaty presented, nor is there anything concerning an authority exercised under the United States. So then the jurisdiction must stand, if at all, on a statute. What statute was drawn in question "that the state court decided against the validity of the claim" made thereunder? Was it the "Act to provide for the sale of the Fort Kearney military reservation in the state of Nebraska?" Chap. 220, Vol. 19, U. S. Stat. at Large.

There is no reference made to this statute in the decision, the pleadings nor the evidence. This statute was interpolated or attempted to be interpolated in

this case for the first time in the petition for the writ of error.

In Spies vs Illinois, 123 U. S. 131, it was said: "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up and claimed. * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

Brooks vs. Missouri, 124 U. S. 394;

French vs. Hopkins, 124 U. S. 524.

In California National Bank vs. Thomas, 171 U. S., 441, it was held that: "A writ of error to a State court will be dismissed when no Federal right was specially set us or claimed until after judgment in the highest court of the State."

Bobb vs. Jamison, 155 U. S. 416;

Winona & St. Paul Land Co. vs. Minnesota, 159 U. S. 540;

Scudder vs. Carter, 175 U. S. 32.

To render a Federal question availing on writ of error to a State court, it must have been raised in the case before judgment and cannot be raised for the first time on a motion or petition for rehearing.

Turner vs. Richardson, 180 U. S. 87;

Pim vs. St. Louis, 165 U. S. 273;

Miller vs. Cornwall R. Co, 168 U. S. 131.

Nor can it be raised for the first time after final decision in the highest court of the State in any manner for the purpose of supporting a writ of error from the Supreme Court of the United States.

Yazoo & M. V. R. Co. vs. Adams, 180 U. S. 1.

The certificate of the Chief Justice of the State court that there is a Federal question does not make one. It is at most presumptive and not conclusive.

In Felix vs Scharnweber, 125 U. S. 54, this court said: "When counsel applying for the allowance of a writ of error insists that federal question has been decided against the plaintiff in error, the Chief Justice of the state court may feel bound to allow the writ for the purpose of submitting to the final determination of this

court whether such a question was necessarily involved in the judgment sought to be reviewed. But his certificate that such a question arose and was decided against the plaintiff in error cannot supply the want of all evidence to that effect in the record. As has been more than once observed by this court 'the office of the certificate as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record but is incompetent to originate the question.' "

Parmelee vs Lawrence, 78 U. S, 36;

Brown vs Atwell, 92 U. S, 327;

Adams County vs Burlington & M. R. R Co, 112 U. S, 123.

And again.

A definite issue as to the validity of a right under a Federal Statute must be distinctly deducible from the record before a state court can be held to have disposed of a Federal question by its decision in respect thereto.

Louisville & N. R. Co. vs Louisville, 166 U. S, 709;

Ansbro vs United States, 159 U. S, 695;

Oxley Stone Co. vs. Butler Co, 166 U. S, 648.

Furthermore.

A right must exist before it can be put in jeopardy. And a person must be possessed of a right before he can invoke the action of a court to protect it. Now, then, what right exists in the plaintiff in error that by the proceeding in this case puts that right in jeopardy? The sole allegation is that he is qualified to enter public lands of the United States under the homestead laws thereof.

This right is not denied nor disputed in this action. What is denied and disputed is that he cannot exercise this inchoate right upon the subject in question because (1) It is not surveyed and listed in the land office for entry. (2) It is not subject to entry until surveyed and listed in the local land office for entry, and (3) Title thereto has passed by the grants of lots 6 and 7 and lots 8 to the respective grantees thereof.

This last might present a Federal question if the plaintiff in error was in a condition to dispute it.

But we take it to be elemental that no one can be heard to question the title of another until he has some right or color of title to the premises in himself. This right must be more than inchoate. It must be a present exisiting right and must be connected in some way with the original source of title.

Aiken vs Ferry, 6 Sawy. 79;

Cucamonga Fruit Land Co. vs Moir, 83 Cal. 101;

Christy vs Scott, 14 How, 282.

In this last case this court said: "But a mere intruder cannot enter on a person actually seized and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

The court cites the following authorities in support of the text:

Jackson vs Boston & Worcester R. R. 1 Cush. 577;

Allen vs Rivington. 2 Sand. 111;

Doe vs Read. 8 East. 356;

Doe vs Dyball. 1 Moody & M. 346;

Calleries vs Cowper. 4 Taunt. 548;

Graham vs Peat. 1 East. 246.

We cite in addition:

Sabariego vs Maverick. 124 U. S. 261;

Hubbard vs Little, 9 Cush, 475;

Pettengill vs Boynton, 139 Mass, 244;

Swift vs Agnes, 33 Wis, 240.

In Hubbard vs Little, *supra*, the court said: "Upon the facts stated in the report it seems to us, that this case falls very clearly within the familiar principle of law that the possession of land is sufficient evidence of seizen to entitle the possessor to hold it, against all persons who cannot show an earlier possession or higher or better evidence of title. * * * It follows that a prior naked possession is a sufficient title against all persons claiming only by possession subsequently acquired, because both titles being in their origin of equal validity, that which is prior in point of time must prevail."

The initial step to acquire rights under the homestead law is the entry of the land at the local land office.

Maddox vs Burnham, 156 U. S, 544;

Rourke vs McNally, 98 Cal, 291.

No rights can be founded upon a mere forcible intrusion on lands already occupied by another.

Atherton vs Fowler, 96 U. S, 513;

Trenouth vs City and County of San Francisco, 100 U. S. 251;

Rourke vs McNally, 99 Cal. 291.

The case at bar may be correctly summarized as follows:

The defendants in error were in peaceable possession of this island. The plaintiff in error, without entry, intrudes thereon. He acquired no rights by the intrusion. Having acquired no rights he has none to protect and he cannot invoke the jurisdiction of this court to protect that which he does not possess.

II.

The decision of the Supreme Court of the state of Nebraska is in accordance with the laws of the United States upon the questions involved.

The questions involved are:

1. Can a survey by the Government of its lands be questioned in a collateral proceeding?

2 Does an unrestricted grant of lands bounded upon a non-navigable stream carry with it title to the center of the stream?

As to the first question. We affirm.

First.

The survey by the United States of its lands when made and approved by it, cannot be questioned in a collateral proceeding.

Second.

That the record of such survey as returned and approved cannot be set aside, changed or modified in any manner, other than by a direct proceeding instituted by the United States only, and for this purpose.

Third.

The record of the survey as returned and approved —until set aside, changed or modified by the United States in the manner aforesaid— imports absolute verity, and is conclusive and binding on every one, including the United States.

As these proposition embody the same principle, they will, for the purpose of brevity, be discussed together.

In West vs Cochran, 58 U. S. 403, the court said:

"It has often been held by this court that the judicial tribunals, in the ordinary tribunals of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for

any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of and make all needful rules and regulations respecting the territory of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority: a cansideration that has occupied a prominent place in the legislation of Congress from an early day."

Considering the same subject in Knight vs United Land Asso., 142 U. S, 161, the court said:

"It is a well-settled rule of law that the power to make and correct surveys of the public lands, belongs exclusive to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

In Cragin vs Powell, 128 U. S, 691, Mr. Justice Lamar, who rendered the opinion, said:

"That the power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subjected to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their

exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." To which he cites.

Steel vs St. Louis Smelting Co., 106 U. S; 447;

U. S. vs San Jacinto Tin Co. 10 Sawy. 543;

Affirmed in 124 U. S. 273;

U. S. vs Flint, 4 Sawy. 61;

Affirmed in U. S. vs Throckmorton, 98 U. S. 61;

Henshaw vs Bissell, 85 U. S. 255;

Stanford vs Taylor, 59 U. S. 409;

Haydel vs Dufresne, 58 U. S. 23;

West vs Cochran, 58 U. S. 403;

Jackson vs Clark, 1 Pet. 628;

Neswanger vs Saunders, 1 Wall. 424;

Suder vs Sickles, 98 U. S. 203;

Frasher vs O'Conner, 115 U. S. 102;

Gozzam vs Phillips, 20 How. 372;

Pollard vs Dwight, 4 Cranch. 421;

Taylor vs Brown, 5 Cranch, 234;

McIneer vs Walker, 9 Cranch, 177:

Craig vs Rodford, 3 Wheat, 594;

Elliecott vs Pearl, 10 Pet, 412.

The reason of this rule is stated in Haydel vs Dufresne, 17 How, 23, "that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."

In Russell vs Maxwell Land Grant Company, 158 U. S, 253, the court by Mr. Justice Brewer said:

"A survey made by the proper officers of the United States and confirmed by the land department, is not open to the challenge by any collateral attack in the courts."

In this case the defendants offered to prove on the trial that the survey upon which the plaintiff's patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Grant so as to exclude the tract in controversy from the boundaries of the Maxwell Grant.

This testimony was rejected by the trial court, and this is the error complained of. This court sustained the rulings of the trial court and held that this evidence was rightfully excluded.

The action of Congress in opening this reservation is found in Vol. 19, page 94, of the United States Statutes at Large being "An act to provide for the sale of the Fort Kearney Military Reservation in the state of Nebraska, which was approved July 21st, 1876, and that portion which might shed some light on this controversy is as follows:

"That it shall be the duty of the Secretary of the Interior to cause said tract of land to be surveyed, sectionized and subdivided as other public lands, and after said survey to offer said lands to actual settlers only at minimum prices under and in accordance with the provisions of the homestead law."

This shows that the survey and the disposition of these lands follows the general law.

In Stoneroad vs Stoneroad, 158 U. S. 240 the court said:

"The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey and issue patent. For this purpose, in the proper administrative branch of the government,

accurate and efficient machinery, accompanied with full remedial process for the correction of error, is provided."

The Statutes of the United States make it the duty of the surveyor to note all water courses over which the line he runs may pass, "and also the quality of the lands." (Sec. 2395, R. S.) "He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the land, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of sale, and to the General Land Office."

The survey by these means become an official record, and is subject to the same rules as other official records.

The holding of the Supreme Court of the state of Nebraska on this subject in this case (65 Neb, 137, 3rd syllabus) is: "The power to make and correct surveys of the public lands belongs exclusively to the political department of the general government, and a plat of a survey made and approved by that department cannot be impeached in the courts, except upon a direct proceeding for that purpose."

This is in accord with the holdings of this court.

The second question, "Does an unrestricted grant of lands bounded upon a non-navigable stream carry with it title to the center of the stream?"

There are no restrictions in the grants of the United States to the lands of defendants in error. The recitals are "according to the official plat of the survey, returned to the General Land Office by the Surveyor General."

See patent to McBride, page 77 of printed record.

In Hardin vs Jordan, 140 U. S. 371, the court said:

"The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor-general, thereby adopting the plat as a part of the instrument."

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake in front of the lands actually described in the grant. This question must be decided by some rule of law. "* * * It has been the practice of the government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity

of upland granted. No charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meandering lines."

See also Packer vs Bird, 137 U. S, 661;

St. Louis vs Rutz, 138 U. S, 226.

In Mitchell vs Smale, 140 U. S, 406, the court said:

"A meander line along a stream or other body of water is not a boundary, but the body of water whose margin is meandered is the true boundary."

St. P. & P. R. R. Co. vs Schurmeier, 7 Wall, 272;

Jefferies vs East Omaha Land Co, 134 U. S, 178;

Hardin vs Jordan, 140 U. S, 371.

In the opinion further on the court says relative to the interference by the United States:

"We think it a great hardship and one not to be endured, for the government officers to make new surveys and grants of the bed of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than tak-

ing from the first grantee a most valuable and often *the* most valuable portion of the grant."

The case of Grand Rapids & Indiana Railroad Co. vs Butler is a case that arose in Michigan, and was tried in the state courts of Michigan, being reported in 85 Mich, 246, and taken to the Supreme Court of the United States. Reported in 159 U. S, 86.

There was an island in Grand River which was left unsurveyed at the time the main land was surveyed. The lots bordering this stream were granted by patent to settlers by the United States. Afterwards the Railroad Company obtained a patent from the United States for the Island. This suit was a contest for this island. Butler claimed it by virtue of his riparian ownership. The railroad company by virtue of its patent. Butler prevailed in the Michigan courts, which judgment was affirmed by the Supreme Court of the United States.

Grant J. of the Michigan court, after stating the facts, said:

"Under these facts the principal question in controversy is, did the original grant carry with it the title to the middle thread of the stream, or was it limited to the east meander line thereof. It is the well recognized rule in this state that a grantee of the land bounded in the deed of conveyance by a stream, takes

title to the land under the water to the center or middle thread of the stream, in the absence of an express reservation. This rule applies to grants by the United States, as well as to individuals. The legal maxim must here be borne in mind, that all grants must be construed most strongly against the grantor. To this maxim the government forms no exception. Reservations cannot be implied, when, therefore, the government has surveyed its lands along the bank of a river and has sold and conveyed such land by government sub-divisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent, it has surveyed such islands as governmental sub-divisions, or expressly reserves them when not surveyed."

Mr. Chief Justice Fuller who delivered the opinion of this Court in that case, after disposing of some minor matters, said:

"The inquiry is reduced then to this: Did the court err in holding as matters of law upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?" (Lyon and Hastings entered this land and received patents from the United States and were the parties from whom Butler derived his title.)

"In Hardin vs. Jordon, 140 U. S., 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect, according to the law of the state in which the land lies, and the following from the opinion of Scates, J., in Middleton vs. Prichard, 4 Ill., 510; 38 Am. Dec. 112, was quoted with approval: "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. At common law this depends upon the character of the stream or water. If it were a navigable stream of water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. At common law, only arms of the sea and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent

says, bears a perfect resemblance to public highways. The consequence of this doctrine is, that all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right."

"The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

In the state of Nebraska the common law is in force as to the rights of the riparian proprietor.

In Wiggenhorn vs Kountz, 23 Neb, 690, the court speaking by Justice Maxwell said:

"There is no doubt of the rule that grants of land, bounded upon a river not navigable, carry with them

the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquae.*"

Clark vs Cambridge & Arapahoe Ir. Co, 45 Neb, 798;

Jefferies vs East Omaha Land Co, 134 U. S, 178.

The land department of the United States, recognizing the rule as applied in Butler vs Railroad Co, 159 U. S, 86 *supra*, and Hardin vs Jordon, 140 U. S, 371 *supra*, have refused to survey any and all islands in the Platte River, and this refusal is based on the ground that they belong to the riparian proprietor. See application of

John C Christensen, 25 L. D, 413;

Dederick C. Glisman, 25 L. D, 474.

See also Exhibits B and C, pages 75-76 of printed record.

The Supreme Court of Nebraska in Wiggenhorn vs Kountz, 23 Neb. on page 695 quotes from Ingraham vs Wilkinson, 4 Pick. 373, which illustrates the respective rights of defendants in error. "The doctrine of alluvion and its consequences seem to be very clearly set-

tled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river, may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquae*, belongs to him who owns the bank on that side; if formed in the middle of the river they are appropriated to the owners on each side, not in common, but in severally, according to their original dividing line, the *filum aquae*, as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. If the *filum aquae* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one-half will belong to the one lord and the other to the other."

The Supreme Court of Nebraska on this subject in this case (65 Neb. 137, syllibi 1 and 2) said: "Grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river; the rule of the common law being that proprietors of land adjoining public rivers not affected by the flow of the tide, own the soil *ad filum aquae*."

"A grant of land bounded upon a non-navigable river, made by the general government with reference to the plat of the survey which shows a meander line along the river bank, conveys to the grantee title to such unsurveyed islands or parts of islands as lie within that limit."

See also opinion in printed record, pages 82–94.

This holding is within the rule laid down by this court in Hardin vs Jordan and Grand Rapids & Indiana Railroad Co. vs Butler *supra*.

All of which is respectfully submitted.

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